United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6137
76-6168

To be argued by
DENNISON YOUNG, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-6137 and 76-6168

W. J. USERY, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

—v.—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEE W. J. USERY SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

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Preliminary Statement

Defendant-appellant International Organization of Masters, Mates and Pilots, International Maritime Division, ILA, AFL-CIO ("IOMM&P" or "union") appeals pursuant to 28 U.S.C. § 1292(a) and by permission of the Court of Appeals pursuant to 28 U.S.C. § 1292(b)*

* The Secretary of Labor has not opposed the certification of the issue which is the subject of this appeal. In view of the fact that the Court of Appeals has granted permission for the union to appeal pursuant to 28 U.S.C. § 1292(b), the Secretary takes no position as to whether jurisdictionally an appeal as of right pursuant to 28 U.S.C. § 1292(a) is proper.

from a portion of an interlocutory order the Honorable Constance Baker Motley entered July 6, 1976 in the United States District Court for the Southern District of New York. The District Court issued its order under its continuing supervisory authority over a new election for this union's International and Offshore Division officers, which election it had previously ordered be conducted pursuant to Section 402(c) of the Labor-Management Reporting and Disclosure Act (the "Act" or "LMRDA"), 29 U.S.C. § 482(c).*

The portion of the order appealed from declared unlawful an arrangement embodied in provisions of the union's Constitution and the union's Offshore Division's By-Laws. Those provisions require that the three International officers (International President, Vice-President and Secretary-Treasurer), who are elected by the membership at large, automatically, and solely by virtue of their election to International office, become the three principal officers (Executive Officer, Assistant Executive Officer and Financial Officer) of the union's Offshore Division, a separate labor organization, without there being an election among the members of the Offshore Division alone for their own principal officers.

Question Presented

Whether the provisions of the union's Constitution and Offshore Division's By-Laws requiring that the three International Officers (President, Vice-President and Secretary-Treasurer), who are elected by the membership at large, automatically, and solely by virtue of their elec-

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* References to the Act will be cited to the United States Code; e.g. Section 401 of the Act will be referred to as Section 481, etc.

tion to International Office, become the three principal officers (Executive Officer, Assistant Executive Officer and Financial Officer) of the Offshore Division, a separate labor organization, without there being a separate election among the members of the Offshore Division alone violates Section 401 of the Act, 29 U.S.C. § 481?

Statement of the Case

The instant appeal marks the second time in six months that this case has been before this Court. On July 12, 1976, the Court affirmed Judge Motley's decision wherein, pursuant to Section 482(c) of the Act, the union's 1971 election of International and Offshore Division officers was declared void and a new election ordered as required by Section 482(c) under the supervision of the Secretary of Labor (hereafter the "Secretary").* (Court of Appeals Decision, A. 297-310).**

Judge Motley's order was not and indeed could not be stayed pending appeal. 29 U.S.C. § 482(d). Thus, the Secretary began the task of supervising the union's new election. In the course of supervision, the Secretary ruled *inter alia*, that the provisions of the union's Constitution and Offshore Division By-Laws creating the arrangement whereby the three International Officers of the union automatically become the three principal Executive Officers of the union's Offshore Division (hereinafter the "arrangement" or "scheme") was unlawful. When the union refused to accede to this and other rulings of the

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* Judge Motley also had ordered that the election be completed by December 31, 1976. This Court, however, modified her order to provide that the election be held at the time of the union's next regularly scheduled election in 1977.

** References to the Joint Appendix will be demarcated by an "A" followed by the appropriate page numbers.

Secretary, the matter was brought before Judge Motley on an order to show cause. (A. 3-5).*

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*The facts preceding the order show cause are set forth fully in the Secretary's papers submitted in support thereof. They may be summarized as follows:

On May 24, 1976 the Secretary's delegate, Gerard Gumpertz, Deputy Administrator for the New York Area Office of the Labor-Management Services Administration, conducted a pre-nomination/pre-election conference with the union and other interested persons to discuss the ground rules for the forthcoming election. Subsequent to the conference, Mr. Gumpertz exchanged a series of letters with the union. He requested therein immediate compliance with at least a few of the Department of Labor's directives discussed at the conference, while the union insisted on waiting for a more detailed letter from Mr. Gumpertz regarding the ground rules generally. (A. 15-22).

By letter of June 15, 1976 to the union Mr. Gumpertz established the ground rules for the forthcoming supervised elections and set the target dates for each of the procedural steps involved in the lengthy election process. (A. 23-36). The letter itemized certain supervisory directives of the Secretary and called upon the union to decide a number of essential electoral matters by June 23, 1976. By letter of June 22, 1973 the union advised Mr. Gumpertz, however, that it could not and would not decide any matter as requested by the Secretary, insisting that decisions had to be made by the membership at large. Additionally the union raised objection to a number of determinations and instructions set forth in Mr. Gumpertz letter maintaining that they were merely instructions of the Secretary and not those of a court. (A. 37-40).

Central among other items involved in Mr. Gumpertz's June 15, 1976 letter was the issue concerning the arrangement. (A. 24). It was explained that under federal law the three principal Offshore Division Officers had to be elected by the members of the Offshore Division. The union disputed the Secretary's interpretation of the federal law on this point. (A. 38).

Issue having been joined on this matter as well as on many of the other ground rules set forth in Mr. Gumpertz's June 15, 1976 letter, the Secretary sought judicial assistance to ensure that the Secretary's supervisory determinations and instructions were obeyed.

On July 1, 1976, while the first appeal was still pending, Judge Motley after hearing lengthy argument and reviewing specifically the Court of Appeals briefs relating to the instant issue * (A. 113) held that the arrangement was unlawful, comparing it in principle to an arrangement for appointing "officers" by the National Maritime Union previously held to be violative of the Act.** (A. 116-117). Her decision declaring the arrangement invalid was embodied in her Order, signed July 2, 1976 and entered on July 6, 1976 (Order, A. 176-181). It is that decision which is the sole subject of this appeal.

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* The instant issue was before the Court on the first appeal but was not decided. It may be helpful to recall the context in which the matter was previously raised. The Secretary had challenged the arrangement in the complaint but did not seek a ruling on it in moving for summary judgment. (A. 236 and 638). The union, however, in cross-moving for summary judgment sought a declaration that the arrangement was legal. (A. 411, 448-453). In granting the Secretary summary judgment, Judge Motley left the arrangement issue open.

On appeal the union briefed the arrangement issue substantively, arguing that Judge Motley should have decided it below. (A. 221-226). The Government also briefed the issue (A. 266-276). However, the Court of Appeals chose not to decide the issue at that time. (A. 307-310).

We note respectfully that the Court of Appeals inadvertently described the arrangement issue as relating to another matter regarding the Offshore Division Vice-Presidents, rather than the three principal Executive Officers of the Offshore Division. (A. 307-309).

** *Wirtz* v. *National Maritime Union of America*, 399 F.2d 544 (2d Cir. 1968) affirming *Wirtz* v. *National Maritime Union of America*, 284 F. Supp. 47 (S.D.N.Y. 1968).

Statement of Facts

The IOMM&P is a national union consisting of approximately 10,000 ship deck officers, including ship captains and ship pilots, with officers in major ports throughout the United States (¶¶ 1, 2 and 3, Pltf.'s 9(g) Stmt., A. 311-312).*

On October 1, 1970 the IOMM&P's newly adopted Constitution became effective (¶ 7 Pltf.'s 9(g) Stmt., A. 312) and it was this Constitution that reorganized the IOMM&P

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* We cite to the statement of facts submitted below by the Secretary together with his original summary judgment motion pursuant to Rule 9(g) of the General Rules of the Southern District of New York (A. 311-337) principally to eliminate unnecessary and redundant referencing. Essentially these factual statements were not—and, clearly, are not now—contested and were otherwise supported by statements made by the union in its answer or in response to different phases of discovery or by the union's own documentary material, much of which was annexed as exhibits to the Rule 9(g) Statement itself. Wherever appropriate in the Secretary's Rule 9(g) Statement reference was made below the factual statements therein to material which supports the statements set forth, all of which was included in the Joint Appendix submitted in connection with the initial appeal in this case and which has been transmitted as part of the supplemental record for the instant appeal. (Supplemental Record, Vols. 2-9). A description of that material is contained on the first page of the 9(g) Statement (A. 311; Supplemental Record, Vol. 5, p. 1261a) and an index to the exhibits may be found in the Supplemental Record, Vol. 5, p. 1288a.

It is clear that the union is not contesting any of the factual statements made and accordingly we believe it would be unnecessary, and perhaps more confusing to the Court than helpful, to cite excessively to the various parts of the Joint Appendix or Record. These facts are presented merely to familarize the Court generally with the structure of the union and are not those facts which are crucial to a decision on the issue presented on this appeal.

into Divisions.* (IOMM&P Constitution, Art. I, Sec. 2; A. 674).

The Offshore Division is the largest division and is comprised of former offshore locals, now denominated as Ports. (¶ 9, Pltf.'s 9(g) Stmt., A. 312). The members of the Offshore Division are seagoing ships officers, sailing aboard Atlantic, Gulf and West Coast ocean going vessels. (¶ 11, Pltf.'s 9(g) Stmt., A. 313). In 1971 there were approximately 8200 members of the Offshore Division (¶ 10, Pltf.'s 9(g) Stmt., A. 313) although that figure may now be somewhat reduced (A. 559-560).**

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* The Constitution that first organized the IOMM&P into divisions was the one that was effective at the time the Secretary made his motion for summary judgment. It was annexed as Exhibit A to the Secretary's Rule 9(g) Statement and is included in the record on appeal (¶¶ 7 and 20, Pltf.'s 9(g) Stmt., A. 312 and 314; see Supplemental Record transmitted to Court of Appeals, Vol. 5, pp. 1291a-1343a). The Constitution presented to Judge Motley as part of the Secretary's papers in support of his motion for the order to show cause (see A. 9, footnote) included some amendments made over the last few years. None of them has any significance, however, with respect to this appeal. All the provisions that relate to the invalid arrangement remain unchanged as do those provisions organizing the union into divisions. Thus, the parties have reproduced in whole in the Joint Apendix only that copy of the Constitution that was before Judge Motley when she rendered the decision from which the appeal herein is taken. References herein, accordingly will be made to the Constitution in the Joint Appendix which may be found at A. 672-704.

** The Offshore Division's By-Laws may be found in the Joint Appendix at A. 338-351. These By-Laws were operative during the 1971 and 1974 union elections (A. 314, 440) and with the addition of but a few unrelated amendments are the By-Laws which were before Judge Motley when she ruled on the invalid arrangement. The amendments which were adopted by the Offshore Division memberships are reproduced in the Joint Appendix as they were proposed to the Offshore Division membership by the Offshore Division's Executive Council. A. 705-706. Apparently no new By-Laws incorporating the amendments have been printed. As is evident, the amendments have no relevance to the issue now before the Court.

The Inland Division is composed of inland locals and consists of ships' officers assigned to vessels sailing in inland rivers, bays and sounds of the United States. (¶ 16, Pltf.'s 9(g) Stmt., A. 313). There were approximately 1500 members of the Inland Division in 1971 in addition to approximately 600 from Inland Local 47 which Local's association with the IOMM&P was in question at that time (¶¶ 15 and 17, Pltf.'s 9(g) Stmt., A. 313). The Inland Division is divided into a west coast region and an east coast region as well as having two isolated locals, and is not yet a fully formed Division (see Lowen deposition, A. 579-580; 1974 certification of election results, A. 400).

A third division, the Pilots Division, consisted of approximately 500 members employed aboard American and foreign flag oceangoing vessels as ships' pilots (¶ 18, Pltf.'s 9(g) Stmt., A. 313).*

All members of the IOMM&P, no matter what their Division may be, vote for the International Officers.** Elections are held for International Officers and Offshore Division officers*** simultaneously every three years

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* The other Divisions listed in Art. I, Sec. 2 of the IOMM&P Constitution are not yet formed.

** IOMM&P Constitution, Art. V, Sec. 3, A. 684; see also 1971 and 1974 certification of election results, A. 352 and 400; see also O'Callaghan deposition, A. 545.

*** Other than for the Executive Officers, the Offshore Division members do alone vote for their other officers which include a Vice-President for the Atlantic area (who serves also as New York Port Agent); Vice-President Gulf (who serves also as Galveston Port Agent); Vice-President Pacific (who serves also as San Francisco Port Agent); and many other Port Agents and Assistant Port Agents. See Offshore Division By-Laws, Art. III, A. 341; see also election results, A. 396-397, 402-406.

(see IOMM&P Brief herein, pp. 12-13; IOMM&P Constitution, Art. V, Sec. 3. [¶ 3], A. 684; Offshore Division By-Laws, Art. XIX, Sec. 2(a), A. 350).

Under the IOMM&P Constitution and the Offshore Division By-Laws, the International President, International Executive Vice-President and the International Secretary-Treasurer automatically become the Executive Officer, Assistant Executive Officer and Financial Officer of the Offshore Division, respectively. (See Art. IX, Sec. 8, IOMM&P Constitution, A. 697; Art. V, Sec. 1, Offshore Division By-Laws, A. 342). There is no separate election for those Offshore Division positions among the members of that Division despite the fact that those officers have significant responsibilities and perform significant duties for the Offshore Dvision alone.

The Offshore Division Executive Officer, *inter alia*, enforces all provisions of the Offshore Division collective bargaining agreements; acts as chairman or designates a chairman of the Offshore Division's collective bargaining Negotiating Committee; and settles disputes, interpretations, grievances or complaints involving Offshore Division collective bargaining agreements. (Offshore Division By-Laws, Art. VI, Sec. 1; A. 342-343).

The Assistant Executive Officer, *inter alia*, assists the Executive Officer and acts in his stead when the latter is not able to perform his duties. (Offshore Division By-Laws, Art. VI, Sec. 2; A. 343).

The Financial Officer receives all monies payable to the Offshore Division and directly, or through delegates, issues receipts for the same. Additionally, among his other duties, he is responsible for the Offshore Division's records, bonds and its other finances and property and

signs all checks in payment of the Offshore Division's obligations. (Offshore Division By-Laws, Art. VI, Sec. 3; A. 343).

In sum, significant executive duties relating solely to the Offshore Division are performed by individuals who are selected by the IOMM&P's entire membership. This means that the Offshore Division members may choose one individual to be their Financial Officer, for example, by means of giving him a majority of their votes in the International election for Secretary-Treasurer, only to have another individual gain that position because of his vote-getting success among the members of the union's other Divisions in the International race. Indeed, that is just what happened in the union's 1974 election.

In the 1974 election, incumbent International Secretary-Treasurer Lowen actually lost the majority vote of the Offshore Division members, yet won enough votes from the members of the other Divisions to secure victory as International Secretary-Treasurer. (A. 400). He now serves as the Financial Officer of the Offshore Division when in fact he was not the choice of the members of that Division for that office.

ARGUMENT

THE SECRETARY AND THE DISTRICT COURT CORRECTLY DETERMINED THAT THE ARRANGEMENT IS UNLAWFUL AND SHOULD NOT BE PERMITTED IN THE COURT-ORDERED SUPERVISED ELECTION.

A. The Secretary Is Required Under His Supervisory Authority to Direct the Union to Abandon Constitutional and By-Law Provisions Which Violate Section 481 of the Act.

Once it has been established that a violation of Section 481 may have affected the outcome of an election

> [T]he court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. 29 U.S.C. § 482(c).

Congress was committed to making the Secretary's intervention in union elections, once warranted, effective, *Wirtz* v. *Glass Bottle Blowers, Local 153*, 389 U.S. 463, 473 (1968), and a supervised election is the *only* way to ensure that the influence of a tainted election may be eliminated. Further, if the Court orders a new supervised election, the order "shall not be stayed pending appeal." 29 U.S.C. § 482(d).

The Secretary's supervisory authority is exceptionally broad and, as long as they are not arbitrary, his decisions made in connection therewith must be heeded by the union. *Brennan* v. *Local 551, United A. A.&A. Imp. Wkers. of A., Inc.*, 486 F.2d 6 (7th Cir. 1973); *Brennan* v. *Sindicato Empleados de Equipo Pesado, Etc.*, 370 F. Supp. 872 (D.P.R. 1974).

In *Brennan* v. *Local 551, United A. A. & A. Imp. Wkers. of A., Inc., supra*, then Circuit Judge Stevens discussed the Secretary's election supervisory powers. In holding that the Secretary, and not the union, could determine the date the supervised election was to be conducted, the Court stated:

> The order of June 18, 1973, [directing a supervised election] specified a remedy which necessarily involves governmental intervention and supervision of a critical aspect of the union's activities, namely its election process. In order to achieve the purpose of the statute, the Secretary must be afforded a wide range of discretion in discharging his supervisory responsibility. The leadership of the union must respect his authority. At 10.

Included within the Secretary's supervisory authority is the power to determine whether provisions of a union's constitution and/or by-laws then existing are lawful within Section 481 and if not lawful to require the union to discard them in favor of proper substitutes, if appropriate. Section 482(c) specifically states that the new election under the Secretary's supervision is to be conducted "*so far as lawful* and practicable, in conformity with the constitution and bylaws of the labor organization." (emphasis added). Once a supervised election is triggered the intention is to insure that the new election is conducted fairly and lawfully in all respects, for no other meaning would allow the Secretary's "intervention, once warranted," to be "effective." *Glass Bottle Blowers; supra*, at 473.

The logic of the Sixth Circuit in *Hodgson* v. *Local 1299, United Steelworkers of America*, 453 F.2d 565 (6th Cir. 1971) is relevant. There in reversing a District

Court's decision to restrict the Secretary's supervision to the balloting aspect of a new election, the Circuit Court found it advisable "to allow the Secretary to supervise the entire election if he deems it necessary." *Id.* at 577. The Circuit Court said: "Not only would this afford maximum protection to the union members but it would also avoid the multiplicity of litigation that could result from incumbent officers violating a different provision of Section 401 [481 of Title 29, U.S.C.] in each new election." *Id.* at 577.

In *Hodgson* v. *Local U. 6799 United Steelworkers of America*, 403 U.S. 333 (1971) Mr. Justice White in his dissent * stated that with respect to a court ordered supervised election the Secretary "is under no obligation, *indeed forbidden*, to follow a provision of the bylaws or constitution that is unlawful." (emphasis added) at 343. Mr. Justice White further added, at 344: "[I]f the Secretary finds an invalid bylaw that purports to govern a new election that has been validly ordered on a claim that has been exhausted, as in this case, the Secretary appears to have express grounds in the Act, independent of the complaint-exhaustion requirements, to insist that the new election be conducted in accordance with the law and to insist that a court adjudicate the matter if the union stands by its bylaw provision."

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* This aspect of Mr. Justice White's dissent was not inconsistent with the majority opinion. The majority opinion merely said the initiation of the Secretary's action must be limited to complaints which a complaining member first appealed to his union, unless the particular violation discovered by the Secretary during his investigation was not one that could be discerned by the complaining union member. The majority did not limit the scope of supervision.

Quoting from Mr. Justice White's opinion and a subsequent majority of the Supreme Court,* the Court of Appeals for the District of Columbia in *Brennan* v. *Local Union No. 639, Int. Bro. of Teamsters, Etc.*, 494 F.2d 1092 (D.C. Cir. 1974), stated that "The [Supreme] Court has clearly distinguished between using a violation as a ground to set aside an election and using a violation with respect to setting the ground rules for a new election which has been ordered." at 1099. It then went on to hold that the district court had not erred by directing the union in the course of the new election not to use an invalid bylaw provision, notwithstanding the fact that that violation might not even have constituted a ground to set aside the election in the first instance.

Accordingly, the new election once ordered is subject to the Secretary's supervision and reasonable directives in all respects. The Secretary has the supervisory power —indeed the obligation—to determine whether the provisions of the union's constitution and by-laws are lawful within section 481, to require that the union abandon or modify those provisions he determines to be violative of section 481 and, in the event the union refuses to adhere to the Secretary's directives, to seek appropriate judicial assistance.

That is precisely what occurred in the instant matter. The Secretary directed the union, *inter alia*, to modify the arrangement or be prepared to hold separate elections

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* *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972) wherein the Court strictly limited rights intervenors had to participate in the Secretary's action to set aside the contested election but in a footnote, noted the limitation was not as stringent with respect to assisting the Secretary fashion a suitable remedy once the court ordered a new supervised election. (at 537 n. 8).

for the Offshore Division Executive Officers in the course of the forthcoming supervised election. When the union refused to obey this directive the Secretary sought judicial assistance.

B. The Arrangement Is Unlawful Because It Violates Section 481 of the Act.

Title IV of the Act (29 U.S.C. §§ 481 et seq.) sets the minimal standards concerning the conduct of elections to which unions must conform. Together with the other parts of that law, it was enacted in response to findings, *inter alia*, of breach of trust, corruption, and disregard of the rights of individual members practiced by labor organizations. See *Wirtz* v. *Glass Bottle Blowers, Local 153*, 389 U.S. at 469-472; 29 U.S.C. § 401. While Congress endeavored not to interfere unnecessarily with unions' rights to govern their own affairs, it nevertheless by this legislation attempted to ensure that ". . . the freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into § 401 [29 U.S.C. § 481]." *Id.* at 471.

The Court need only look to Section 481 of the Act to see that the union's method for selecting the three Executive Officers of the Offshore Division is prohibited. Section 481 in pertinent part provides:

> (a) Every national or international labor organization, except a federation of national or international labor organizations, *shall elect its officers* not less often than once every five years either *by secret ballot among the members in good standing* or at a convention of delegates chosen by secret ballot. (emphasis added)

> (b) Every local labor organization *shall elect its officers* not less often than once every three years *by secret ballot among the members in good standing.* (emphasis added)
>
> (d) *Officers* of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, *shall be elected* not less often than once every four years *by secret ballot among the members in good standing* or by labor organization officers representative of such members who have been elected by secret ballot. (emphasis added)

The meaning of these provisions is clear. Elections for officers must be held and "members in good standing" *alone* are entitled and must be provided the right to elect the officers of their own labor organization. Those who are not members of a particular labor organization are not permitted to participate in the election of that labor organization's officers either directly or indirectly.

This reading of the statute is reinforced by the purpose for which the Act was promulgated. The Congressional declarations of findings, purposes and policy in the very first section of the Act begins as follows:

> "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' *rights to . . . choose* their *own* representatives . . ." 29 U.S.C. § 401(a) (emphasis added).

The Supreme Court, too, after setting forth the legislative history of the Act in the *Glass Bottle Blowers Case, supra*, recited the mandates of Section 481 specifically noting that "Elections *must be* by secret ballot *among the members in good standing* except that international

unions may elect their officers at a convention of delegates chosen by secret ballot [among such members]." (emphasis added) at 471-47[illegible].

Clearly the members in good standing, and they alone, are permitted to elect the representatives who perform vital services solely on their behalf. The logic for this is further emphasized in *Wirtz* v. *Hotel, Motel & Club Employees, Local 6*, 391 U.S. 492 (1968) where the Supreme Court explained that the Congressional history of the Act "indicated a need to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." 391 U.S. at 497. As the House and Senate well stated: "The Government which gives unions . . . power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent." S. Rep. No. 187, 86th Cong., 1st Sess., (1959); H.R. Rep. No. 741, 86th Cong., 1st Sess., (1959); 1959 U.S. Code Cong. Adm. News, pp. 2336 and 2438. Thus it is apparent that if elections of union officers are not in fact held, those who perform the officer responsibilities by appointment or otherwise need not be responsive to the membership. Similarly, to the extent non-members vote in a labor organization's elections there can be no assurance that the elected officials will be fully responsive to the membership they purportedly represent. Leadership loyalties will be divided between members and voting non-members, and this may very well reflect itself in the making of decisions vital to the members' well-being. The members in good standing of a labor organization, accordingly, must be given the opportunity to have an election conducted for their own officers and to participate in such an election alone.

The arrangement at issue on this appeal deviates from these principles and violates Section 481. There has been no election solely among the Offshore Division members for the Offshore Division's three principal officers. Any argument that the election of the International Officers was a lawful election for Offshore Division Executive Officers must fail since it is clear that the Offshore Division is a separate "labor organization" and its Executive Officers are "officers" within the meaning of the Act. In short the Offshore Division members were deprived of their right to elect their *own* officers without the intrusive votes of the members of the other Divisions.

The union does not dispute that Offshore Division is a separate labor organization as defined in the Act (29 U.S.C. §§ 402(i) and (j)).* The functions the Offshore

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* Sections 402(i) and (j) provide:

(i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

(j) A labor organization shall be deemed to be engaged in an industry affecting commerce if it—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization

[Footnote continued on following page]

Division performs through its Executive Officers, Executive Council and its other officers, negotiating contracts and handling grievances, for example, more than qualify the Offshore Division as a labor organization.* The extent of these responsibilities has been acknowledged by the IOMM&P in its brief herein (see IOMM&P Brief, p. 9) and by the union's counsel in his papers submitted in response to the Secretary's motion for summary judgment (A. 450-451). Also, one need only scan the Offshore Division's collective bargaining agreement (A. 476-521)** to see the vital role these officers play in the lives

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recognized or acting as the representative of employees of an employer or employers engaged in a industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.

* See e.g. Offshore Division By-Laws, Art. VI (duties of officers); Art. IX (Executive Council); Art. X (membership, strike and negotiating committees); and Art. XI (collection of dues and initiation fees). (A. 342-346).

** The collective bargaining agreement was submitted in 1974 in response to plaintiff's interrogatories (see A. 472 and 474).

and working conditions of the members they are supposed to represent. See the statements made by former International President O'Callaghan (A. 538-541; 552-556; 568) and International Secretary-Treasurer Lowen (A. 582-583; 585; 588-589) during their depositions below; see also *Brennan* v. *United Mine Workers of America*, 475 F.2d 1293, 1296 (D.C. Cir. 1973).

Similarly, the union does not dispute that the Offshore Division's Executive Officer, Assistant Executive Officer and Financial Officer are "officers" as also defined in the Act (29 U.S.C. § 402(n)).* Under the definition of "officer", these three Executive Officers must not only be considered "constitutional officers" by virtue of their inclusion in the Offshore Division By-laws, but also these officers perform such "executive functions" as to require that they be deemed "officers" under the definition.** See *Wirtz* v. *National Maritime Union of America*, 399 F.2d 544, 550-553 (2d Cir. 1968).

Clearly, then, under Section 481 there should have been in 1971 and 1974—and should be in the forthcoming supervised election—a separate vote for these Offshore Division Executive "officers". In fact, however, the Offshore Division By-Laws and IOMM&P Constitution do not permit

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* Section 402(n) provides:

> (n) "Officer" means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

** See e.g. Offshore Division By-Laws, Art. VI, Secs. 1, 2, and 3 (A. 342-343) wherein their duties are set forth (see also p. 9-10, *supra*); see also statements by former International president O'Callaghan and Secretary-Treasurer Lowen in their depositions which have been cited on this page above.

one. Instead by operation of the provisions of these charters, the three principal officers of the Offshore Division are *de facto* "appointed" to their positions depriving the Offshore Division members of their right to elect their own officers. The election of International officers cannot be considered an adequate substitute for the requirements of Section 481 since it is not restricted to the *members in good standing* of the Offshore Division alone.* However the Court chooses to look at the arrangement, it does not square with the provisions of Section 481.**

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* "Member" or "member in good standing" is defined as follows:

29 U.S.C. § 402

(o) "Member" or "member in good standing", *when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization,* and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization. (emphasis added)

Clearly, only the members of the Offshore Division are members or members in good standing of that "labor organization". Members of the Pilots and Inland Divisions are not members or members in good standing of the Offshore Division.

** The Court need not decide whether the Offshore Division is a national, intermediate or local organization or determine, in particular whether Section 481(a), (b) or (d) has been violated; for no matter what the Offshore Division is called, the plain fact is that the Offshore Division holds its elections simultaneously with the International elections every three years (see pp. 8-9, *supra*) and under its By-laws and the IOMM&P Constitution *no proper election* at all has been or can be held. That is all that need be shown to establish that the invalid arrangement violates Sections 481 (a), (b) and/or (d).

In addition, the invalid arrangement necessarily violates Section 481 (e) by not permitting members the right to nominate, vote for and otherwise support candidates of their choice in a legally required separate election for the Executive Officers of the Offshore Division.

The arrangement is fraught with the potential for electing those who are not "responsive" to or representative of the Offshore Division membership. It is not unlikely that an Offshore Division member running under the present scheme for International President could receive a majority of Offshore Division votes but fail in his bid to become International President. This result would deprive Offshore Division members of their choice for Offshore Division Executive Officer, an officer who performs vital functions for the Offshore Division as a separate entity. Indeed, as noted above (*supra*, p. 10), this is just what happened in the 1974 election for International Secretary-Treasurer. Incumbent Secretary-Treasurer Lowen was defeated by Captain Brown in total Offshore Division votes but won the election because of his plurality in the Inland and Pilots Divisions. (A. 400). Although not the choice of the Offshore Division, Lowen became its Financial Officer. He now performs vital executive functions for a labor organization whose members rejected him at the polls. This, we submit, is just the kind of situation the Act sought to prohibit by requiring that labor organization permit only the members in good standing to elect their own officers.* Historically all elections for the International officers of this union are close. (A. 528). In 1974 there was a run off between the two top vote getters for the International President and Vice-President positions. (A. 201). Thus, what happened with respect to Lowen is not unlikely to occur again and again.

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* As one of the union's own attorneys has said, under the present arrangement it is even possible for a member of the Pilots Division or Inland Division (also separate labor organizations) to be elected International President and thereby become the Executive Officer of the Offshore Division, with all the representative responsibilities of that office, notwithstanding that person might not have the appropriate license to hold such Offshore Division office. (A. 608).

By enactment of LMRDA, Congress intended union elections to be modelled on democratic principles as known in the United States. See *Wirtz* v. *Hotel, Motel & Club Employees, Local 6*, 391 U.S. at 496, 504. Not only does the arrangement not conform to the strict requirements of the Act, but it also does not conform to democratic political principles. The arrangement would be analogous to the President of the United States assuming the role of Governor of New York simply because the people of New York participated in the Presidential election. That is precisely the relationship between the IOMM&P International officers and the three top officers of the Offshore Division that the union suggests is proper. The International President automatically becomes Offshore Division Executive Officer merely because the Offshore Division members participate in the International election. Such a scheme is undemocratic and should not be tolerated. The Offshore Division performs significant, separate functions for its members. As the people of New York are permitted to elect their own Governor, the members of the Offshore Division alone should have the right to elect their own officers. Indeed, Section 481 requires it.

C. The Union's Arguments Are Without Merit

In an effort to have this Court construe section 481 to mean something other than what the words plainly say, the union presents arguments which are clearly without merit.

The union in Point I of its Brief suggests that Judge Motley erred in relying on *Wirtz* v. *National Maritime Union of America*, 399 F.2d 544 (2d Cir. 1968) in support of her ruling that the arrangement violated Section 481. What is clear, however, is that Judge Motley did not say that the fact pattern there was identical to

the instant case. All she indicated was that the situation in the instant case is "similar in that the officers of the Offshore Division are not elected *as required by that statute.*" (A. 117) (emphasis added). And indeed, that is precisely the situation. In the *National Maritime Union* case the Second Circuit made it clear that a port agent and certain patrolmen were to be considered "officers" (because of their inclusion as such in the N.M.U. Constitution and because of the duties they performed) whose ". . . responsiveness [to their members] can be insured only by requiring their election." 399 F.2d at 552. Similarly in the instant case the Offshore Division's Exective Officers' responsiveness can only be assured if they are elected separately by the Offshore Division members alone. Judge Motley's analogy to the N.M.U. was entirely proper.

In Point II of its brief, the union preliminarily insists, in sum, that the Act does not permit an intrusion into the internal affairs of a union's electoral processes, presenting to this Court in support thereof partial quotations from the *Hotel, Motel & Club Employees* case, *supra*, and Congressional debate.

This argument has already been answered by the Supreme Court. On the same page of the *Hotel, Motel & Club Employees* case from which the union quotes (IOMM&P Brief, pp. 14-15 and 17) the Court said:

> But this emphasis [against unnecessary interference] overlooks the fact that the congressional concern to avoid unnecessary intervention was balanced against the policy expressed in the Act to protect the public interest by assuring that union elections would be conducted in accordance with democratic principles. As we said in *Wirtz* v. *Bottle Blowers, supra*, at 473, decided after the Court of Appeals decided this case, ". . . Congress,

although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV." Thus, "the freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles *written into § 401*." *Id.*, at 471 (Emphasis added.) In a companion case, *Wirtz* v. *Local 125, Laborers' Int'l Union*, 389 U.S. 477, 483, we said that the provisions of § 401 are "necessary protections of the public interest as well as of the rights and interests of union members." IIn sum, in § 401 ". . . Congress emphatically asserted a vital interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Wirtz* v. *Bottle Blowers, supra*, at 475. 391 U.S. at 496-497.*

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* Similarly, the segmented quotations (IOMM&P Brief pp. 16-17) from Senator Morse, who actually was one of two Senators voting against final passage of the Senate House Conference Report. (See Legislative History of the LMRDA of 1959, Vol. II, p. 1453; 105 Cong. Rec. 17919-17920 (1959)), when put in full context further demonstrate vividly that even he felt it necessary for the type of legislative intervention that the Act provides. (Senator Morse's comments came in response to a proposed amendment by Senator Curtis which would have required, essentially, that union elections be held by secret ballots mailed to union members' last known home addresses). In full, the comments of Senator Morse appearing on page 16 of the IOMM&P's brief follow, with the portions deleted by the unions italicized:

> I say most respectfully that what the amendment of the Senator from Nebraska would do would be to have the Congress of the United States dedicate to the unions what their constitution and by laws procedure shall be in conducting their elections.
>
> The purpose of the bill is to provide to the membership

[Footnote continued on following page]

The provisions of Section 481 provide the minimal requirements to which unions *must* adhere. They are not superficial gloss which unions can circumvent as the IOMM&P seeks to do here through the arrangement.

Additionally in Point II, the union argues that the Secretary's objection to the invalid arrangements rests with the manner in which the Offshore Division has structured its Executive Officers' positions and not so much with the duties their officers must perform. (See pp. 19-20, IOMM&P's Brief). That is precisely the point! The Secretary readily concedes that the Offshore Division is entitled to perform the normal functions of a union, e.g.

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of the unions a guarantee of democratic procedures, and not to have Congress to legislate for the unions. *Under the Kennedy-Ervin bill, it is for Congress to provide the procedures under which democratic elections can be held by the determination of the membership of the unions themselves.*

I do not propose to vote for an amendment which undertakes to turn the Congress of the United States into a constitutional convention and bylaws legislative body for all the unions of America. See Legislative History of the LMRDA of 1959, Vol. II, pp. 1244-1245; 105 Cong. Rec. 6732(1959).

Clearly even Senator Morse realized that the time had come for Congress to provide at least the minimal standards to which unions must adhere.

Additionally, the Senator's statements appearing on page 17 of the union's brief were shortly followed by this further quotation which reinforces the Secretary's position herein:

> If responsibilities are to be developed in unions, then *it is necessary to give them a framework* in which they can exercise their democratic rights with respect to the overall democratic procedures which are guaranteed by the bill (emphasis added). *Id.*

The Act provides the minimal "framework" for union democracy. The IOMM&P's arrangement falls outside that framework.

collectively bargain, handle grievances and so forth. Our only objection is that the Executive Officers who are engaged in performing these functions at this time under the present structure are not in fact elected alone by the members they represent and this violates the law. Contrary to the assertions of the union, the Secretary does not insist that the Offshore Division or the IOMM&P restructure itself in any particular manner.* All the Secretary is arguing in the instant case is that the structure now existing whereby the International Officers automatically become the Offshore Division Executive Officers is illegal. There may be ways in which the union could modify the arrangement to make it acceptable under the Act. But failing that, the Executive Officers, demarcated as such in the Offshore Division By-Laws and performing vital executive duties, under the law must be elected by the Offshore members alone. The fact that a modification of the invalid arrangement may cause some incidental difficulties to the union cannot be used as a barrier to the legal mandates set forth in the Act.

The union, as it did below just before Judge Motley ruled (A. 115-116), now queries whether the Executive Officers of the Offshore Division, if separately elected are to be paid. That, we submit is a decision for the union to make. All the Secretary insists upon is that, unless the union modifies the arrangement in some acceptable way, there be Executive Officers as identified in the Offshore Division By-Laws separately elected by

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* On page 20-21 of its brief the union suggests the Secretary is trying to force the union to adopt a particular structure.

the Offshore members and who will perform the executives duties set forth in the By-Laws themselves.*

In Point III of its Brief, the union finally articulates its principal argument. It suggests that the Act "does not impose an absolute prohibition against any person who is not a member of a particular subordinate organization (but who is a member of a parent organization) participating in the selection of persons to fill prescribed positions in the subordinate organization." (IOMM&P Brief, pp. 24-25), *citing Fritsch* v. *Painters, District*

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* The union also attempts to distinguish away the importance of the Executive Officers of the Offshore Division by emphasizing that they are only three of a many membered Offshore Division Executive Council which has final control over the activities of that labor organization. This argument has no merit. The simple fact is that even if their powers were limited the Executive Officers are nevertheless "officers" who must be "elected" by the members in good standing of the Offshore Division. That they have any power at all is even further reason to ensure the exercise of that power is responsive only to the needs of the Offshore Division members alone and this can be accomplished only by separate elections among the members of the Offshore Division. Indeed, however, their powers are not as limited as the union would like this Court to believe. This is made evident by the description of their duties and other responsibilities contained in the Offshore Division By-Laws and by the statements of former President O'Callaghan (the President/Executive Officer has "overall supervision" of the Offshore Division [A. 553]) and Secretary-Treasurer Lowen (the President/Executive Officer is the "prime negotiator" for the Offshore Division [A. 588]).

The union also asks rhetorically what the duties of International officers will be if the Offshore Division's Executive Officers are separately elected and assume the Offshore Division duties (IOMM&P Brief, p. 22). This too, like all other problems raised is a red herring. It is up to the union to decide the functions of its own officers.

Council 9, Brotherhood of Painters, Decorators and Paper Hangers of America, 493 F.2d 1061 (2d Cir. 1974) and *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171 (1964) in support of that position.

For all the reasons set forth above, the union's position is wrong. The Act does prohibit members of one labor organization from voting in another labor organization's elections. Furthermore, if anything the *Fritsch* case is in further support of the Secretary's position. That case, affirming Judge Brieant below (359 F. Supp. 380 (S.D.N.Y. 1973)), at best stands for the proposition that voting schemes such as the one here at issure are reviewable under Title IV of the Act but not Title I (i.e., 29 U.S.C. §§ 411-415, the union members' Bill of Rights). In this connection, we note that Judge Brieant in the case below expressly stated that the voting scheme the court could not reach in that Title I action would have been illegal under Title IV because, like the instant case, it permitted members of one labor organization to participate in the selection of a bargaining representative for an affiliated labor organization. 359 F. Supp. at 395. The invalid arrangement here has the same effect. This is a Title IV action and accordingly the arrangement should be declared illegal.*

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* The union also cites *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171 (1964) and *Gordon* v. *Laborers' International Union of No. America*, 351 F. Supp. 824 (W.D. Okla. 1972), reversed and remanded [in part], *sub nom., Associated Gen. Con. of A., Inc., Okl., Etc.* v. *Laborer's Int. U.*, 476 F.2d 1388 (Em. Ct. App. 1973), affirmed in part and reversed in further part, *Gordon* v. *Laborers' International Union of No. America*, 490 F.2d 133 (10th Cir. 1974). These cases are inapposite. At most they can be cited merely for the proposition that when members of a labor organization choose to be represented

[Footnote continued on following page]

The test of the arrangement's legality is not one of "reasonableness" as the union suggests (IOMM&P Brief, p. 25). Rather it is whether the scheme comports with Section 481. As we have already shown, it does not conform with the minimal standards of that section. The union's arguments do not overcome the plain meaning of Sections 481(a), (b) and (d) [nor subsection (e) for that matter]. Accordingly, we submit Judge Motley's ruling declaring the arrangement in violation of the Act should be affirmed.

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by a system of delegate representation, the delegates need not be bound to a weighted system of voting. No matter how many members any particular delegate may represent, the members of the labor organization may choose to allow each delegate only one vote on any particular question and not a total number of votes equivalent to the total number of members represented.

This is far different from suggesting that those who are not members of a particular labor organization may participate in the labor organization's selection of its officers, which is the situation raised herein. While properly elected delegates may represent disparate numbers of members, even they should be elected by those they purport to represent. There is no law to suggest that those whom they do not represent should be entitled to vote for such delegates. One might more properly analogize the instant matter concerning the arrangement to a situation involving the "stuffing" of ballot boxes. In such situation additional votes are cast which should not be, with the concomitant result that representatives may be chosen who may not reflect the will of the majority. Indeed, the problem of ballot box stuffing was among the types of problems which led Congress to enact the LMRDA. See Rezler, *Union Elections: The Background of Title IV of LMRDA*, in Symposium on LMRDA, 475, 484 (Slovenko, ed. 1961).

CONCLUSION

It is respectfully submitted that the District Court's decision that the union's arrangement, whereby its International Officers become the Executive Officers of the Offshore Division, is in violation of Section 481 of the Act be affirmed.

Respectfully submitted,

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State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

29th day of **November**, 1976 she served 2 copies of the within **(govt's) brief on behalf of appellee W.J. Usery Sec. of Labor US Dept of Labor**

by placing the same in a properly postpaid franked envelope addressed:

Marvin Schwartz, P.C.
243 Waverly Place,
New York, NY 10014

And deponent further says she sealed the said envelope and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

29th day of **November**, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977